IN THE

Supreme Court of the United States

October Term, 1957

No. 549

VETO GIORDENELLO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The government contends that waiver of preliminary hearing constitutes an admission against interest (Govt. Br. 12, 29) and that this Court should ignore the constitutional and historical differences between an indictment and an affidavit for a warrant (Govt. Br. 29-35). These arguments are fully discussed in the dissenting opinion below and in petitioner's brief on the merits. This reply

brief is devoted only to the government's new thought—that an arrest by a Federal officer, executing an invalid Federal warrant, may somehow be condoned by a State statute purporting to grant State officers powers to search on suspicion.

I.

WITHOUT A WARRANT, THE ARREST IN THIS CASE WOULD BE INVALID UNDER STATE LAW

The loose standards established by Section 15, Article 725-b, *Texas Penal Code*, authorizing searches by peace officers who "have reason to believe and do believe" that narcotics might be discovered, clearly violate the Fourth Amendment. This statute is constitutionally palatable only because the Texas Court of Criminal Appeals requires, ". . . that the officer have some information that the accused was violating the law, plus some act on the part of an accused which would bolster and support such belief." *Thomas v. State*, 288 S.W. 2d 791, 793.

This "act on the part of an accused" must be of an incriminating nature in itself. It must, under State law, be more than mere association with a wanted "police character" coupled with nervous behavior. *Harper v. State*, 284 S.W. 2d 362. A defendant in Texas must do something more than carry a brown paper bag in the presence of a person being arrested for possession of marijuana. *Giacona v. State*, 298 S.W. 2d 587.

These decisions rest upon the conclusion of the Court of Criminal Appeals that any other result would violate both the State and Federal Constitutions. *Giacona v. State*, *supra*, 298 S.W. 2d 587, 588-589. No act of this petitioner,

while under observation by Mr. Finley, would provide any greater basis for an arrest in Texas than the evidence in *Thomas*, *Harper* and *Giacona*, *supra*.

II.

IF THE STATE STATUTE WOULD AUTHORIZE AN ARREST WITHOUT WARRANT UNDER THE FACTS IN THIS CASE, THAT STATE STATUTE WOULD VIOLATE THE FEDERAL CONSTITUTION

If a State statute affirmatively sanctions an arrest which violates the Fourth Amendment, that statute is invalid under the Due Process Clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28.

Nothing in *Brinegar v. United States*, 338 U.S. 160, suggests that personal knowledge of some incriminating fact is not a necessary ingredient of the probable cause needed to support an arrest without warrant under Federal law. That opinion repeatedly emphasizes that the arresting officers did have personal knowledge of Brinegar's activities (338 U.S. at 166, 168, 169 and 172). It requires "facts and circumstances" which are *both* ". . . within their knowledge and of which they had reasonably trustworthy information . . ." 338 U.S. at 175-176.

In this case, the Federal agent admitted that he never saw petitioner with any heroin hydrochloride (R. 16), with narcotics (R. 17), or violating any law of the United States (R. 22). On the day of the arrest, Mr. Finley saw only that petitioner was accompanied by a "police character" and carried a brown paper bag. Certainly no one would suggest that these facts alone could justify an arrest compatible with the Fourth Amendment.

It was only Mr. Finley's "information" which might make these facts significant or suspicious. Under Federal law, that "information" should have been presented to and evaluated by a magistrate, not by Mr. Finley, if a lawful arrest was to take place.

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14.

III.

REGARDLESS OF THE POWERS WHICH A STATE LEGISLATURE MAY WISH TO GIVE STATE OFFICERS, FEDERAL AGENTS SEEKING EVIDENCE TO BE OFFERED IN FEDERAL COURTS ARE LIMITED TO THE POWERS WHICH CONGRESS WISHES THEM TO HAVE.

The government contends that State statutes can give Federal officers *carte blanche* to arrest in accordance with State practice, citing *United States v. Di Re*, 332 U.S. 581, and *Johnson v. United States, supra*, 333 U.S. 10 (Govt. Br. 15).

Only two terms ago, this Court made it clear that:

> "Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules." *Rea v. United States*, 350 U.S. 214, 217.

The government's argument requires a bold and questionable departure from *Di Re* and *Johnson, supra.* Those cases dealt with the admissibility, in Federal courts, of evidence seized during arrests by State officers. In *Di Re,* this Court referred to ". . . the arresting officer, a state officer . . ." 332 U.S. 581, 588. In *Johnson,* Lt. Belland of the Spokane, Wash., police department, was the key figure in the arrest. 333 U.S. at 12.

This Court has not yet decided that the States may enlarge the arrest powers of Federal officers when Congress has not seen fit to do so. *Rea v. United States, supra,* establishes that the States have no such power.

IV.

IN THE DISTRICT COURT THE GOVERNMENT CHOSE TO STAND OR FALL ON THE VALIDITY OF THE WARRANT; THE CONVICTION CANNOT BE SUPPORTED, AND THE ACCUSED CANNOT BE SUBJECTED TO REPEATED JEOPARDY, ON THE STRENGTH OF ISSUES REJECTED BELOW.

Even today, relying on a new theory involving arrests without warrant under State law, the government tells the Court that this arrest was made, ". . . on the basis of the warrant . . ." (Govt. Br. 5). On trial, the U. S. Attorney convinced the District Judge that he should take *judicial notice* that this arrest was based, ". . . on a complaint and warrant." (R. 37).

If the government's new theory is correct, the petitioner should at least be entitled to a new trial. "A Court . . . very rarely can be justified in giving judgment upon

grounds that the record was not intended to present." *Casey v. United States*, 276 U.S. 413, 419. Had the government even suggested on trial that Mr. Finley had some right to arrest without warrant, the defense could have challenged whether he actually had an honest belief based on credible information. *Scher v. United States*, 305 U.S. 251, 254; *Roviaro v. United States*, 353 U.S. 53, 61.

Even if the government's new theory would have had merit in the District Court, the petitioner is entitled to more than a new trial. He is entitled to a judgment of acquittal.

"No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." United States Constitution, Amendment V. Just this term, this Court recognized that the State, ". . . with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense . . ." *Green v. United States*, __ U.S. __, 2 L. Ed. 2d 199, 204, 78 S. Ct. 221, 223.

This prohibition should include new legal theories which the prosecution rejected below by choice. The government should be estopped from resuscitating, in the Supreme Court, arguments which it consciously avoided on trial.

Even in civil cases, this Court recognizes that a party may not repudiate a position deliberately selected on trial. *Brown v. Gurney*, 201 U.S. 184, 190. Certainly no defendant in a criminal case would be allowed to choose a defense for the first time in an appellate court.

Considering:

(a) the double jeopardy clause of the Fifth Amendment, and,

(b) the government's demand, on trial, that this arrest be considered as an arrest based on a warrant (R. 37),

this Court should hold that the government is now precluded from claiming that this arrest could be sustained without a warrant, should reverse this conviction, and should enter a judgment of acquittal.

Respectfully submitted,

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